IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 129 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

BHARATKUMAR R PANCHAL.

Appearance:
MR Akil Qureshi with Mr MANISH R BHATT for Petitioner
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 21/09/2000

ORAL JUDGEMENT

This is a Reference under section 256 (1) of the Income tax Act, 1961 at the instance of the revenue.The following question of law has been referred for our opinion:

"Whether on the facts and in the circumstances of the case,, the impugned amount of Rs. 22,400/received by the assessee on retirement as a result of revaluation of the assets is not taxable u/s 28 (iv) or section 41(2) of the I.T. Act, 1961?'

The facts giving rise to this Reference are as under :

The assessee along with his father Babubhai alias Ranchhodbhai Panchal and two brothers were partners in a firm named Panchal Engineering Works. They were other four partners who were real brothers of the assessee. A dispute arose between the partners and on 23.7.1977, other four partners separated from the said firm to start a new firm in the name and style of New Panchal Works. At the time of separation from the above mentioned partners from Panchal Engineering Works, the plant and machinery as also two cars were revalued to a sum of Rs.1,60,000/- and were divided amongst the partners in their profit sharing ratio. It was done by debiting the machineries revaluation account and crediting respective accounts of the partners.

In the assessment year 1978-79, the ITO took the view that sum of Rs.,22,400/- received by the assessee was taxable as income u/s 28 (iv) of the Act.

In appeal preferred by the assessee, the AAC took the view that the amount received by the assessee as a partner was not only taxable under section 28 (iv) but also taxable under section 41 (2) of the Act.

The assessee then approached the ITAT .The Tribunal, relying on the decision of Division Bench of this Court in CIT vs. Dilip Engineering Works, 129 ITR 688, came to the conclusion that the amount received by the assessee as a partner of erstwhile partnership would not be taxable under the provisions of section 41 (2) of the Act .The Tribunal also held that the amount would also not be taxable under section 28 (iv) of the Act.

It is on the above facts that the above quoted question has been referred to us for our opinion.

The two relevant provisions applicable in the relevant assessment period are required to be noticed. Section 28 prescribes heads of profits and gains of business or profession which can be brought to tax.Clause (iv) of section 28 reads:

"28. The following income shall be chargeable to income tax under the head "Profits and gains of business or profession"

(i) x x x

(ii) x x x

(iii) x x x

(iv) the value of any benefit or perquisite, whether convertible into money or not,arising from business or the exercise of a profession"..

Without reference to any case-law on the subject, in our considered opinion, on the plain language of clause (ix) of section 28, the amount received by the assessee as a partner in erstwhile partnership, on separation of some of the partners, cannot be described as benefit or perquisite as have arisen from the business or the exercise of a profession. The amount has been received by the assessee when four of his partners separated from the erstwhile partnership and shares of erstwhile partners in that firm were divided along with assets.

Section 41 contains provisions for charging profit to tax and the relevant sub-section (2) reads as under:

"Where any building, machinery ,plant or furniture which is owned by the assessee and which was or has been used for the purpose of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case maybe, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chgargeable to income tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due".

For application of sub-section (2) of section 41,

monetary benefit which can be received on sale, discarding, demolishing or destruction of any building, machinery,plant or furniture should be from the business of the assessee.

In the facts of the present case, monetary value of his share in profit and profession received by the assessee as a partner of the firm, at the time when four other partners left the partnership, was not income from the business received by the partner on sale, discarding, demolition or destruction of any building, machinery, plant and furniture.

As has been held by Division Bench of this court in the case of Dilip Engineering Works (supra), where any land or money is allotted to any partner in lieu of his share, it cannot be said to be sale by the firm to the concerned partner.

Applying the same reasoning to the present case, as a partner of the firm, on separation of other four partners of the firm, whatever monetary benefit the assessee received as proportionate value of his share and assets,was not money received from any `sale' within the meaning of section 41 (2) and,therefore, the said amount received by him as a partner cannot be subjected to tax as profit under the said section.

As a result of the aforesaid discussion, the question referred to us is answered in the affirmative in favour of the assessee and against the revenue. Reference is accordingly disposed of but with no order as to costs.

(D. M.Dharmadhikari, C.J.)

(A. R. Dave, J.)

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